IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 319 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

GOVINDBHAI ATAMARAM

Appearance:

1. Criminal Appeal No. 319 of 1989

MR IM PANDYA, APP for Appellant

MR PN GOHIL for Respondent

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 13/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

The State has preferred this appeal against the judgment and order of acquittal passed by the learned Addl. City Sessions Judge, Ahmedabad, in Sessions Case No.228 of 1988 whereby the learned Judge has acquitted the accused of the offences punishable under Sec.20(2) read with Sec.22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act' for short).

2. The brief facts are that on 19-2-1986 one Rajaram Brijlal Luhar, a Head Constable, posted at Shahibaug Police Station was on duty in Shahibaug Police Station area along with other police officers including Police Constables, Jasuji Keshaji and Arvindsinh Shankarsinh and at about 7.00 p.m., Police Constable, Arvindsinh informed Rajaram that one Govind Atmaram Patel used to keep charas in his cycle shop situated at Haripura Village. When he along with two panchas reached there, Govind Atmaram Patel was there. On a search being carried out in his shop in presence of panchas, police personnel and said Govind Atmaram, nothing was found from his shop as well as from the ground floor of the house. They did not find anything from the first floor also. It is the case of the prosecution that on the top floor of the house, one plastic bag was lying very near to the wall of the room in which contraband article charas weighing 20 gms. of was found from the said bag. Panchnama was drawn there and muddamal was seized in the presence of panchas. Rs.60/-were recovered from the accused and on demand, the accused provided three things. All these things were seized and, therefore, said Rajaram drafted the complaint and sent the same along with search and seizure panchnama, muddmal and accused to Shahibaug Police Station for registering prohibition offence against the respondent-accused. Upon receipt, offence was registered by P.S.O. of Shahibaug Police Station as Shahibaug Police Station C.R.No.112 of 1986 for the offence punishable under Sec.20(2) read with Sec.22 of the Act and also under Sec.66(b) of Bombay Prohibition Act and sent the accused to Madhavpura Police Station. Thereafter, investigation was handed over to Laxmansingh. Muddamal was sent to FSL along with other 45 muddamals. On completion of investigation, charge-sheet was submitted against the accused in Court. Charge was framed against the accused. The accused denied the said charge and prayed for trial.

2.1 To prove the guilt against the accused, prosecution examined, in all, 10 witnesses namely, Shri Rajaram Brijlal Luhar, the complainant as P.W.No.1 at Ex.7, panch witnesses namely, Shri Baldevji Chhanaji as

P.W.No.2 at Ex.3, Shri Ramesh Pratapji Thakore as P.W.No.3 at Ex.10, Mr.I.P.Parmar, Head Constable who was PSO of Shahibaug Police Station as P.W.No.4 at Ex.12 and Shri M.K.Parmar, the Crime Writer Head Constable as P.W.No.5 whom prosecution handed over the muddamal and who in turn sent the same to FSL on 27-4-1986 i.e. after about two and half months along with other 45 muddamals in two parts, muddamal articles from Sr.Nos.1 to 30 in the first part and rest of the muddamal in the second part. Prosecution has also examined Shri P.D.Chavda as P.W.No.9 at Ex.21, Shri M.U.Patel, the Senior Scientific Assistant of FSL as P.W.No.10 at Ex.25. After recording the further statement of the accused under Sec.313, Cr.P.C. and after hearing the learned advocates appearing for the respective, the respondent-accused was acquitted by the learned Addl. City Sessions Judge, Ahmedabad, of the charge framed against him which is giving rise to prefer this criminal appeal.

3. Heard learned APP for the State, Mr.I.M.Pandya and Mr.P.N.Gohil, learned counsel for the respondent-accused.

4. Mr.Pandya has taken us through the reasoned judgment together with oral as well as documentary evidence and argued that the judgment and order of acquittal is against the law and material on record. Sufficient and reliable materials are on record to convict the accused which ought to have been minutely scrutinized and appreciated by the court below. The ration card showing the name of accused as one of the beneficiaries is a strong material evidence against the accused for conviction. Court below ought to have believed the say of the complainant as search and seizure were made in his presence. He has taken us through the evidence of Police Officers who have conducted the search and seizure, filed the complaint and drawn the search and seizure panchnama. He has also taken us through the evidence of FSL expert and also the register showing that muddamal in question has been searched and seized from the custody of accused and same has been sealed in presence of panchas and it remained with the custody of Madhavpura Police Station and sent in tact condition to FSL. In this regard, he has taken us through the evidence of FSL people together with documentary evidence and argued that muddamal in question seized from the accused reached the FSL authorities in tact condition and was found to be contraband article charas and, therefore, chain of evidence has been proved by the prosecution and, therefore, court below ought to have accepted the same in toto and convicted the accused.

5. Mr.Gohil, learned counsel for the respondent-accused, has mainly argued that while conducting search and seizure, since the relevant mandatory provisions of the Act were not followed by the prosecution, court below has rightly acquitted the accused considering all the aspects of the matter. In this connection, he has taken us through the complaint, search and seizure panchnama and evidence of Police officers and argued that mandatory provisions as required under the provisions of Sec.41 onwards of the Act were not followed by the concerned authority. Taking us through paras 31 and 32 of the judgment, he has argued that notification published in Gujarat Gazette in Part-IV-B at pages 111-1 known as Gujarat Amendment became effective with effect from 15-6-1987 while search and seizure was made by the Head Constable on 19-2-1986 which is admittedly before the coming into force of Gujarat Amendment. Hence, concerned Officer was not empowered to carry out the search and seizure. In this connection, he has placed reliance on a decision of the Apex Court in the case of State of Punjab Vs. Balbir Singh, AIR 1994 S.C. 1872 wherein it has been held at head note (A) as under:

> "Criminal P.C. (2 of 1974), Ss.4, 100, 165--Search and seizure--Carried out by Police Officer in normal course of investigation into offence or suspected offence as provided under Cr.P.C.--If there is a chance of recovery of narcotic drug or psychotropic substance, the empowered officer from such stage onwards carry out investigation as per provisions of NDPS Act. S.50 of NDPS Act not applicable to such search."

It has been held at head note (C) as under:

> "Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S.42(1)--Search and Seizure --Empowered officer or an authorized officer under S.41(2) carrying out search--He would be doing so under Ss.100 and 165, Cr.P.C.--However, if there is no strict compliance with provisions of Cr.P.C. search would not be illegal."

Relying upon the above, it is submitted that court below has rightly acquitted the accused and since judgment and order of acquittal is just and proper, same may not be interfered with in this appeal.

6. We have gone through the oral as well as the

documentary evidence as also the impugned judgment delivered by the court below. It reflects from the record that date of incident is 19-2-1986 whereas the Gujarat Notification is dated 15-6-1987 which is admittedly before the Gujarat Amendment coming into force. Since the concerned person carrying out search and seizure was not empowered to do so under the relevant provisions, court below has rightly placed reliance upon the same after discussing in paras 31 and 32 of the judgment. Over and above, even as per the evidence of the complainant, who himself was the concerned person conducting search and seizure, has fairly admitted in his evidence and is reflecting from the FIR, panchnama and evidence of members of raiding party that the complainant who has received prior information through one Arvindsingh has not reduced the said information in writing. Similarly, when they reached the scene of offence, no efforts were made by members of the raiding party in seeking the willingness of the accused of conducting search in presence of an Executive Magistrate or a Gazetted Officer. It is established from the record that the muddammal which is alleged to have seized from the accused has remained with the prosecution for a period of more than two months without any satisfactory explanation comingforth from the prosecution to satisfy the conscience of the Court. PSO, Crime Writer Constable and concerned person alleged to have taken muddamal to FSL have admitted in their evidence that the muddamals were sent to FSL along with other 45 muddamals in two sets, one set consisting of muddamal articles from Sr.Nos.1 to 30 and the other set consisting of remaining muddamal articles. The prosecution has also failed to establish regarding the conscious possession as the secret information received indicates that the accused was having muddamal article in his bicycle shop, but nothing was found there. However, it was found lying very near to the wall of a room on the top floor of his house. From the cross-examination, it is established that the house was having two sides where other members were also staying. In this way, the prosecution has failed to prove the guilt against the accused from all counts. It is clearly established from the aforesaid that it is a case of breach of mandatory provisions of the Act which ultimately resulted into acquittal of the accused and, therefore, court below has rightly held that prosecution has failed to bring home the guilt against the accused. Since no illegality or irregularity has been committed by the learned Judge in arriving at such a conclusion, in view of the aforesaid judgment relied upon by the learned counsel for the respondent, the impugned judgment and order of acquittal does not deserve any

interference. Hence, this appeal is required to be dismissed.

7. The appeal is dismissed.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAVE,J.)
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